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PETITION TO ACCEPT UNINTENTIONALLY DELAYED PAYMENT OF MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378 (c))

Docket Number (Optional)

TD-101

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APR 09 2009

OFFICE OF PETITIONS

Mail to: Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450
Fax: (571) 273-8300

NOTE: If information or assistance is needed in completing this form, please contact Petitions Information at (571) 272-3282.

Patent No. 6,816,151 Application Number 09/986,591
Issue Date 11/09/2004 Filing Date 11/09/2001

CAUTION: Maintenance fee (and surcharge, if any) payment must correctly identify: (1) the patent number (or reissue patent number, if a reissue) and (2) the application number of the actual U.S. application (or reissue application) leading to issuance of that patent to ensure the fee(s) is/are associated with the correct patent. 37 CFR 1.366(c) and (d).

Also complete the following information, if applicable

The above – identified patent

☐ Is a reissue of original Patent No. _____ original issue date _____
original application number _____
original filing date _____

☐ resulted from the entry into the U.S. under 35 U.S.C. 371 of international application _____
filed on _____

CERTIFICATE OF MAILING (37 CFR 1.89(a))

I hereby certify that this paper (*along with any paper referred to as being attached or enclosed) is being deposited with the United States Postal Service on the date shown below with sufficient postage as first class main in an envelope addressed to Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450, or facsimile transmitted to the U.S. Patent and Trademark Office on the date shown below.

March 31, 2009
Date

David L. Banner
Signature

David L. Banner

Typed or Printed Name of Person Signing Certificate

This collection of information is required by 37 CFR 1.378(c). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to take 1 hour to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, Virginia 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop Petition, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

1. SMALL ENTITY

☒ Patentee claims, or has previously claimed, small entity status. See 37 CFR 1.27.

2. LOSS OF ENTITLEMENT TO SMALL ENTITY STATUS

☐ Patentee is no longer entitled to small entity status. See 37 CFR 1.27(g)

3. MAINTENANCE FEE (37 CFR 1.20(e)-(g))

The appropriate maintenance fee must be submitted with this petition, unless it was paid earlier.

NOT Small Entity			Small Entity		
Amount	Fee	(Code)	Amount	Fee	(Code)
<input type="checkbox"/> \$ _____	3 ½ yr fee	(1551)	<input checked="" type="checkbox"/> \$ 490	3 ½ yr fee	(2551)
<input type="checkbox"/> \$ _____	7 ½ yr fee	(1552)	<input type="checkbox"/> \$ _____	7 ½ yr fee	(2552)
<input type="checkbox"/> \$ _____	11 ½ yr fee	(1553)	<input type="checkbox"/> \$ _____	11 ½ yr fee	(2553)

MAINTENANCE FEE BEING SUBMITTED \$ 490

4. SURCHARGE

The surcharge required by 37 CFR 1.20(i)(2) of \$ 1,640 (Fee Code 1558) must be paid as a condition of accepting unintentionally delayed payment of a maintenance fee.

SURCHARGE FEE BEING SUBMITTED \$ 1,640

5. MANNER OF PAYMENT

☒ Enclosed is a check for the sum of \$ 940

☐ Please charge Deposit Account No. _____ the sum of \$ _____

☐ Payment by credit card. Form PTO-2038 is attached.

6. AUTHORIZATION TO CHARGE ANY FEE DEFICIENCY

☐ The Director is hereby authorized to charge any maintenance fee, surcharge or petition deficiency to Deposit Account No. _____

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7. OVERPAYMENT

As to any overpayment made please

OR

☐ Credit to Deposit Account No. _____

☐ Send refund check

WARNING:

Petitioner/applicant is cautioned to avoid submitting personal information in documents filed in a patent application that may contribute to identity theft. Personal information such as social security numbers, bank account numbers, or credit card numbers (other than a check or credit card authorization form PTO-2038 submitted for payment purposes) is never required by the USPTO to support a petition or an application. If this type of personal information is included in documents submitted to the USPTO, petitioners/applicants should consider redacting such personal information from the documents before submitting them to the USPTO. Petitioner/applicant is advised that the record of a patent application is available to the public after publication of the application (unless a non-publication request in compliance with 37 CFR 1.213(a) is made in the application or issuance of a patent. Furthermore, the record from an abandoned application may also be available to the public if the application is referenced in a published application or an issued patent (see 37 CFR 1.14). Checks and credit card authorization forms PTO-2038 submitted for payment purposes are not retained in the application file and therefore are not publicly available.

8. STATEMENT

The delay in payment of the maintenance fee to this patent was unintentional.

9. PETITIONER(S) REQUEST THAT THE DELAYED PAYMENT OF THE MAINTENANCE FEE BE ACCEPTED AND THE PATENT REINSTATED

David L. Banner
Signature(s) of Petitioner(s)

March 31, 2009
Date

David L. Banner
Typed or printed name(s)

39898
Registration Number, if applicable

(607) 341-4122
Telephone Number

P.O. Box 8859
Address

Endwell, NY 13760
Address

37 CFR 1.378(d) states: "Any petition under this section must be signed by an attorney or agent registered to practice before the Patent and Trademark Office, or by the patentee, the assignee, or other party in interest."

ENCLOSURES

☒ Maintenance Fee Payment

☒ Surcharge under 37 CFR 1.20(i)(2) (fee for filing the maintenance fee petition)

☐ _____



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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OFFICE OF PETITIONS

Appl. No. : 09/986,591
Patent No. : 6,816,151
Applicant : Terry L. Dellinger
Filed : November 9, 2001
TC/A.U. : 2674
Examiner : Henry N. Tran
Docket No. : TD-101
Title : HANDHELD TRACKBALL COMPUTER
: POINTING DEVICE
Customer No. : 46,292

L E T T E R

Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

S I R:

Enclosed herewith is a Petition to Accept an
Unintentionally Delayed Payment of Maintenance Fee relating to
the above-identified United States patent. This petition is

filed subsequently to the dismissal of a Petition to Accept an Unavoidably Delayed Maintenance Fee Payment.

A copy of the Decision On Petition Under 37 C.F.R 1.378(b) is enclosed herewith.

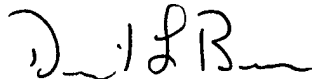
I understand that the petition fee previously paid is creditable to the higher fee for the "Unintended" petition. Consequently, a check in the amount of \$940 is also enclosed herewith.

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to:

Mail Stop Petition
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

On March 31, 2009

(Date of Deposit)



David L. Banner

3/31/2009
(Date)

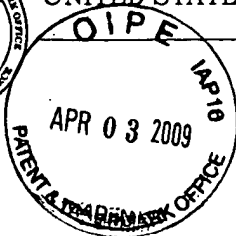
Respectfully submitted,



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UNITED STATES PATENT AND TRADEMARK OFFICE



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P.O. BOX 8859
ENDWELL NY 13762

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In re Patent No. 6,816,151
Issue Date: November 9, 2004
Application No. 09/986,591
Filed: November 9, 2001
Attorney Docket No. TD-101
Patentee: Terry Dellinger

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DECISION ON PETITION
UNDER 37 CFR 1.378(b)

RECEIVED

MAR 19 2009

BY: _____

This is a decision on the petition under 37 CFR 1.378(b), filed December 29, 2008, to accept an unavoidably delayed payment of a maintenance fee for the above-identified patent.

The petition is **DISMISSED**.

If reconsideration of this decision is desired, a petition for reconsideration under 37 CFR 1.378(e) must be filed within TWO (2) MONTHS from the mail date of this decision. No extension of this 2-month time limit can be granted under 37 CFR 1.136(a) or (b). **Any such petition for reconsideration must be accompanied by the petition fee of \$400 as set forth in 37 CFR 1.17(f).** The petition for reconsideration should include an exhaustive attempt to provide the lacking item(s) noted below, since, after a decision on the petition for reconsideration, no further reconsideration or review of the matter will be undertaken by the Director.

The patent issued November 9, 2004. The first maintenance fee could have been paid from November 9, 2007, through May 9, 2008, or with a surcharge during the period from May 10, 2008 through November 9, 2008. Accordingly, the patent expired at midnight November 9, 2008, for failure to timely submit the first maintenance fee.

A petition to accept the delayed payment of a maintenance fee under 35 U.S.C. § 41(c) and 37 CFR 1.378(b) must be accompanied by (1) an adequate showing that the delay was unavoidable, since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent, (2) payment of the appropriate maintenance fee, unless previously submitted, and (3) payment of the surcharge set forth in 37 CFR 1.20(i)(1).

This petition lacks item (1) above.

The Director may accept late payment of the maintenance fee if the delay is shown to the satisfaction of the Director to have been "unavoidable". 35 U.S.C. § 41(c)(1).

Petitioner states that the delay in payment of the first maintenance fee was unavoidable since the mailed payment was returned to sender.

The showing of record is inadequate to establish unavoidable delay within the meaning of 37 CFR 1.378(b)(3).

In determining whether a delay in paying a maintenance fee was unavoidable, one looks to whether the party responsible for payment of the maintenance fee exercised the due care of a reasonably prudent person. Ray, 55 F3d at 608-609, 34 USPQ2d at 1787. It is incumbent upon the patent owner to implement steps to schedule and pay the fee, or obligate another to do so. See California Medical Products v. Technol. Med. Prod., 921 F.Supp 1219, 1259 (D. Del. 1995). That is, 37 CFR 1.378(b)(3) requires a showing of the steps in place to pay the maintenance fee, and the record currently lacks a showing that any steps were emplaced by petitioner or anyone else. In the absence of a showing that petitioner or anyone else was engaged in tracking the maintenance fee due dates, and that party had in fact been tracking the due dates with a reliable tracking system, such as would be used by prudent and careful men in relation to their most important business, petitioner cannot reasonably show that the delay was unavoidable delay. In re Katrapat, 6 USPQ2d 1863, 1867-1868 (Comm'r Pat. 1988); California, supra.

While petitioner acknowledges that he was aware of the maintenance fee due and attempted to pay it, the petition does not indicate that steps were taken to ensure payment of the fee. Here, the payment of the maintenance fee attempted on Monday, November 10, 2008 was mailed to the wrong address even though the correct address was available. The correct address was published as a Notice in the *Official Gazette* of the USPTO on December 25, 2007 and was available since then on the USPTO website, www.uspto.gov. The record does not show how the incorrect address was used despite the exercise of due care. A renewed petition should explain the steps taken to ensure payment of the fee, including the efforts expended in obtaining the mailing address, and how petitioner was "unavoidably" prevented from making the maintenance fee payment.

Petitioner should also note that since the maintenance fee was proffered within 24 months of the date of expiration date of the patent (i.e.: prior to November 9, 2010), he has an alternate remedy under the unintentional provisions of 37 CFR 1.378(c) which does not require a showing of the delay in timely paying the maintenance fee in order to reinstate the patent. This option is available if the delay in payment of the fee due was actually "unintentional" such that payment was not delayed as a result of petitioner's intentional choice to pay other expenses rather than the fee due. In this case, the \$700 already submitted would be applied to the \$1,640 fee owed under 37 CFR 1.378(c), leaving a balance due of \$940. A separate petition for this option may be filed using form PTO/SB/66, which is available at the USPTO website www.uspto.gov.


Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
 Commissioner for Patents
 Post Office Box 1450
 Alexandria, VA 22313-1450

By hand: Customer Service Window
 Mail Stop Petitions
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

By fax: (571) 273-8300
 ATTN: Office of Petitions

Any questions concerning this matter may be directed to the Christopher Bottorff at (571) 272-6692.


David Bucci
Petitions Examiner
Office of Petitions